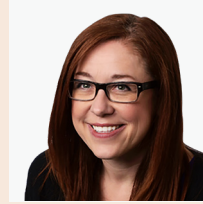


Legal Considerations for Your Workplace Vaccination Policy



Rob Parsons

Manager, Content and Brand
Paychex, Inc.



Sheri Giger

Principal, Jackson Lewis P.C.

Full transcript

Rob Parsons:

Welcome to the Paychex HR Leadership Series. I'm your host, Rob Parsons. I lead the content team here at Paychex, and we write extensively on a variety of HR topics, covering everything from HCM tech, to team engagement, to compliance with state and federal regulations. In this podcast, we speak with leaders and thinkers in the industry to provide our audience with the latest HR insights and information, and hopefully more than a little inspiration. Joining me today is Sheri Giger.

Rob Parsons:

Sheri is the Principal in the Pittsburgh, Pennsylvania office of Jackson Lewis P.C., and she is co-leader of the firm's Disability, Leave, and Health Management Practice Group. Her practice focuses on preventative advice and counsel, particularly in the area of leave management, focusing on the ADA, FMLA, paid sick leave and related leave statuses and policies. And of course that now includes COVID-19 vaccination policies, certainly a top of mind topic.

Rob Parsons:

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Rob Parsons:

Okay, let's get to it.

Rob Parsons:

Sheri, welcome to the podcast.

Sheri Giger:

Thanks for having me, Rob. I'm happy to be here to discuss this ever-changing and emerging issue.

Rob Parsons:

It's exciting. Personally, I've got my second vaccine scheduled for tomorrow night. I've already been warned and told, "be ready to take the day off on Friday," as there may be some effects and you may feel the second shot.

Sheri Giger:

That's what we're hearing, that's what our clients are telling us, and that's what we see of course in the news as well. So yeah, so that's one of the important considerations that we can talk about in more detail as part of the employer's planning for when employees do get vaccines.

Rob Parsons:

Perfect. It's great talking to you about this. We've worked quite a bit... As we're keeping track of the state closings and re-openings, you've been instrumental helping us with our tool to help just track everything that's going on. I think one thing we've seen is that this is a constantly changing landscape.

Sheri Giger:

I agree. And, at some point I think we thought, "Oh, this will slow down at some point in time," but it is just marching on. The train is on the track. And I do not know if it actually is going to slow down anytime soon in 2021. I think we're in it for the long haul.

Rob Parsons:

For better or worse, right?

Sheri Giger:

That's right. For better. [inaudible 00:02:55].

Rob Parsons:

There you go.

Rob Parsons:

We conducted some research recently. We wanted to see what business owners and HR leaders thought about what their role might be in employee vaccinations. And we found that the vast majority, especially in larger companies, they really plan on having a role in vaccinations. But when you and I talked about this, it became obvious to me there's a lot of different ways to go. That one size doesn't fit all, and there's a lot of different approaches. Can you give me just a quick, 10,000-foot overview of the types of ways people can go about their vaccine policies?

Sheri Giger:

Yes. And this is evolving, so this may be a different conversation three months from now. We're not sure yet as this evolves.

Sheri Giger:

Employers we see are taking a lot of different tactics. And it's dependent upon what the employer wants to do, working and understanding any potential legal parameters that are out there as well. But we do see employers either take a position on mandatory policies or ---- as we call them ---- encouraged policies, where employers are encouraging policies ---- vaccine policies ---- either with or without incentives. And then we have a policy that we call the "truly voluntary policy." And that's a policy that, it really just states the intent of, "we're supportive, everyone can make their own decision, and if you need anything let us know as you go through whatever process works for you." That is the most general policy that we see employers implement. But they're all options, depending on the legal implications.

Rob Parsons:

For sure. Now it strikes me that from an administrative standpoint, truly voluntary has got to be the easiest to deal with. I mean, just total hands-off, "your-business-is-your-business." But, are there pitfalls for HR leaders potentially ---- or business owners ---- if they look at a truly voluntary policy?

Sheri Giger:

Well, the voluntary option we see a lot of employers using now, one, because the whole issue of the emergency use authorization status of the vaccine. It is still an unknown whether that applies to private employers or not, so that does help employers on what path they would like to take. As far as potential pitfalls of the purely voluntary policy, they're more practical in nature in that you may not have as much of the workforce vaccinated as might be ideal. And we are still constantly learning and looking to the CDC and state health departments for guidance on what's safe. Is there a herd immunity number? That number gets bandied around a bit. So the pitfalls are more practical in nature. More of the pitfalls come, potentially, with mandated policies.

Rob Parsons:

I know we might be getting into some specifics here, and if it's not ground we're comfortable covering, do just let me know... What if I'm an employee at a company that just has a truly voluntary policy, and I'm not comfortable going in knowing that there's potentially people here who haven't been vaccinated, potentially people here who could still get the coronavirus and potentially be a danger to me? How do you handle those situations?

Sheri Giger:

If employees are concerned about coming into the workplace where some members of the workforce aren't vaccinated, it's important for employers to communicate the safety protocols that are in place that make it a safe workplace. Of course, the recommendation is to have safety protocols remain in place, including social distancing, masking, use of other protocols. Some employers have plexiglass walls in place and other types of protocols. That's helpful to ensure and to communicate to employees that it is a safe workplace.

Rob Parsons:

Everything we've really been recommending right along; have safety procedures in place, have your protocols in place, and be transparent with people about what you're doing to make sure it's a safe work environment.

Sheri Giger:

Correct. Everyone's working through this together and everyone wants a safe workplace.

Rob Parsons:

On the other side of the spectrum, we're talking about a full, mandatory policy. Now I know there's absolutely got to be some situations where people have to do that, it's just the nature of their business or their organization, or what they're doing... But there's still got to be some nuance to that. Maybe you could discuss that a little bit for us.

Sheri Giger:

Absolutely. Yes, there are a lot of layers around mandatory vaccination policies. Now, as we sit here talking today, there is no "per se" law or statute that says employers must mandate, and there is no "per se" law statute that says, employers may not mandate. I'm going to carve out Utah, there, because there's legislation being passed, but at this point it looks like it applies to the state, not employers. That's still being looked at.

Sheri Giger:

When mandating, employers have to have a few things in mind. These are moving pieces, and each of them will continue to evolve as well. One is the requirement that if an employee cannot receive the vaccine due to a medical reason, or a religious reason, or pregnancy, then an employer has to make an accommodation to the mandatory vaccine policy. The EEOC explain that in more detail in its guidance that it issued in December. So we know the EEOC's position on that. That's a really important part of any mandatory vaccine policy.

Sheri Giger:

Another issue is what the employer wants to do regarding the EUA status, the emergency use authorization. If there is not further guidance, that's always a potential risk. We are seeing employers take that fact, and debate it, and try to make a decision that's right for their organization. So there's the exemptions, there's the EUA status, and then we can't forget that there are also pending laws out there and state law guidance, and they can all be very different.

Sheri Giger:

For example, New Jersey, just this week... And I was excited because it happened right before ... I think it was yesterday actually. New Jersey issued a guidance that said employers are permitted to mandate the vaccine. So we now know what the state of New Jersey feels. However, in that same guidance, it did not address the issue of the EUA status. It did not address the issue of, how does this impact other areas of the workplace? So we have that guidance out there. On the other hand --- also in the last day or two --- Maryland just introduced legislation that would prohibit employers from mandating the vaccine.

Sheri Giger:

So as this continues to evolve, I suspect that it is going to be an emerging patchwork of, "where can we?" And "where can we not?" Of course, we're looking to see if the courts have any cases to decide, as well, on the issue, which will also be instructive for various jurisdictions.

Rob Parsons:

I get the feeling that if I'm a multi-state employer, this is going to be a really challenging next few months to try to negotiate the right thing to do.

Sheri Giger:

I think it is. For multi-state employers, I think it's helpful to know what you're dealing with, even though it changes and evolves. So it's the simple, put it in a spreadsheet, look at all of the jurisdictions and locations where you have employees working, and then populate it with any current orders, whether there's any pending legislation, which could or could not be passed --- because it's pending, we don't know --- but it's a consideration. And to look at any edicts or prohibitions that the orders may cause issues in implementing. That kind of gives you a footprint of, "here's what we're looking at," and something visually to see, and then work through each of those jurisdictions, and states, and locales, to see what might be preventing you from implementing any vaccine policy that you plan to implement.

Sheri Giger:

It's a process. It's a decision-making process that we're new to because we've never had to deal with it to this extent before. H1N1 never got to this extent. This is all unprecedented, it's all new and everyone's working through it together, as well.

Rob Parsons:

It's the... I've been using this line too much lately, but we're "building an airplane while we're in air."

Sheri Giger:

That's a great analogy. Yes. I like that. Can I steal that?

Rob Parsons:

Yes. You can absolutely steal that. I'm sure I stole that from someone else.

Sheri Giger:

I like that. I love that. But, yeah, it's very complicated, and the decision-making process is. But I think that what's important is employers should keep in mind that even if they have a plan in place, just to have the flexibility that they may have to pivot depending on what comes up. These variants are starting to pop up --- we have no idea what's going to happen with that. I am not a medical expert by any stretch of the imagination; I'm an employment lawyer. But we don't know how that will impact. And we do see states opening. We can have our plans pivot as well, and that includes vaccination planning.

Rob Parsons:

So, we've talked about fully mandatory. We've talked about truly voluntary. There is that middle ground that you mentioned, that "encouraged" approach. You also noted there were some layers, specifically around motivating employees to be vaccinated. Can you elaborate and even share some of the potential issues? Because this seems to me very sensible, but also I know in the world of employment law, there's always an issue.

Sheri Giger:

For encouraged policies, we want to have an educational aspect to the policy. First, any policy should explain to employees that, "We take the position that we encourage the policy" in order to help employees decide, "Am I going to get a vaccine?" While it is truly their personal decision, providing employees with education is helpful so that they can keep up-to-date on the most current information that's coming out from entities such as the CDC. Also, what's important is for employers to, perhaps, help employees get the vaccine. Maybe part of the communication plan is, "This state or this locale is offering vaccines next week at this location. Here's a link to sign up should you choose to sign up."

Sheri Giger:

There's a lot of struggles in various jurisdictions and states. Some are actually getting the vaccine; some states are still at the first tier, which actually is a problem in mandatory right now. Just because you mandate it doesn't mean all your employees can necessarily get the vaccine. Providing that information to employees may help employees who are frustrated, or who can't find a vaccine or an appointment even if they want it. That's part of the educational process, as well, and providing information.

Sheri Giger:

Anything an employer can do to help an employee with the information, we're seeing working, because there are employees out there who do want to be vaccinated, as well. And, of course, that works nicely with an encouraged policy.

Rob Parsons:

I like that layer of educating and supporting. I've got to think as an employer; That's really a nice way also just to connect and just to make sure the employees know you're thinking about them, you do care. "I know it's been frustrating. I know you're looking for a place to go. Here's what we're hearing. We've got some connections maybe you don't have, and we can make it possible."

Rob Parsons:

Now what about actually incentivizing it? Giving people time off, giving people Amazon gift cards... What's the story with that type of activity in policy?

Sheri Giger:

We view that as another form of an encouraged policy, where if you do get the vaccine, we will provide you with something. We are seeing monetary amounts, we are seeing gift cards. The only thing employers have to be careful of there is the potential implication of that falling under the wellness plan rules and guidelines under the ADA. If that is the case, you have to offer a reasonable alternative to employees who cannot get the vaccine; you can't restrict. So you have to be careful about that. There's just another layer of consideration and analysis basically --- to talk with your benefits folks about it. I always say, the higher the dollar amount, is it really looking more like a mandatory vaccine program at this point in time? Because, who can turn that down?

Sheri Giger:

Also, the training of supervisors and managers. While it may be an encouraged policy, you don't want anybody saying, "Hey, you really should get the vaccine," and pressuring employees, which makes it look more like a mandatory vaccine program as well. That's kind of a slippery slope that we think we all have to be careful of.

Sheri Giger:

What we do see a lot of employers doing, is to provide extra time off in order to go get the vaccine. Some employers are offering paid time off policies to go get the vaccine --- so many hours per shot --- if it's a two shot course. Also --- and I think this is what you may be planning for, Rob --- knowing that some side effects can come from the first or second dose, that the employee may need the day off afterwards to deal with any symptoms and side effects of the vaccine.

Sheri Giger:

The considerations of what to do have to be taken into account. Now, don't forget about state laws. I'm sure we probably all saw by now that New York just passed a state law that says employers must provide paid time off, for up to four hours per dose, to employees. That time period, that bucket of time, is separate and apart from any other type of leave they provide.

Sheri Giger:

States are starting to take action on this as well. Illinois just released guidance that says, "Here's what the state of Illinois, the Labor Department believes employers should do when employees go to get vaccines." If mandatory, you probably have to pay for it. In fact, Illinois, I think, even said it stronger; "You need to pay for it." And, if voluntary, then consider allowing employees to use existing paid time off or paying them for that time, with the underlying presumption that the more people who are vaccinated, the more helpful, because that's the state we are in the country right now. The more, the better, if you are vaccinated. That just helps employers. Those are other considerations for employers to take into account.

Rob Parsons:

I want to go back to... I thought it was really interesting what you touched on about managers. It strikes me that you would recommend a very well documented, and very well communicated, vaccine policy to make sure everybody's on the same page, because if we just handle it verbally, just talk about it, just think, "This is how we're going to do it," we could be sending mixed messages. Our managers could be sending completely different messages from what we want sent. Tell me what that written policy looks like. How would you want to go about that for a vaccine policy? Because it's new.

Sheri Giger:

It is new. Generally, following other policies, it's not going to look so much different. But generally, we recommend that it include the company's position on the vaccine, what type of vaccine policy is it, and then discussing the benefits that may come along, if you decide staying in the encouraged world here. "If you decide to go get a vaccine, you can let us know and we will provide you with time off." Or, "Perhaps schedule your second dose on a day that bumps up into a weekend for you." Or, "We will understand if you need to take the day off." Employers should be careful of --- if everyone goes to get the vaccine on the same day, that means that there's a possibility that a lot of employees may have side effects and need the time off at the same time. So that could inadvertently bump into staffing issues.

Sheri Giger:

I see some employers who are trying to, or planning to, when available, perhaps just have a kiosk available; Partnering with a local pharmacy or whoever they can partner with. And even for encouraged, "If you choose to go to get the vaccine, here's a kiosk that we have here."

Sheri Giger:

There are some other issues with having that --- not as much with encouraged, more so with mandatory --- because, remember with mandatory, if it's truly mandate --- even with the exceptions --- if an employee has a severe reaction, could that be a Workers' Comp issue, we're not sure. But the states are going to figure that out because Workers' Comp are state-based issues.

Sheri Giger:

There's just some more layers depending on what you want to do. It's almost as if any decision in the point of the process that you're at, probably has side issues that you need to consider to make sure what's right for you, and what risk you're willing to do.

Rob Parsons:

Another thing I want to touch on: You've dropped some acronyms on us, those I'm sure are familiar with the audience. Is there anything else we need to be mindful of as we construct these policies? Are there any other departments, regulations? Is there an emerging case law? Is there anything else we should be thinking about as we construct our policies just to make sure we don't inadvertently make a mistake, or put our company at risk at all?

Sheri Giger:

Yes. There was a case filed in New Mexico against a public employer --- that's different than private employment. The basis of the complaint was challenging a mandatory vaccine where the plaintiff is basically, generally, alleging that, "You can't make me do this." It does hinge on the Emergency Use Authorization status, at least in part from what we can tell right now, of what's been filed. We all want you to watch that to see, not so much because it's a public employer, but just to see how a court handles this, because this is a completely novel issue, and that could be instructive in other cases as well. So that's something that's very important to consider.

Sheri Giger:

We suspect that there'll probably be other cases and, here at my firm, we try to track those and keep up-to-date. We have a team of people who do that. We just have to keep an eye on everything that's going on with all of these various moving pieces.

Rob Parsons:

Excellent Sheri. That was a lot of information in a short time.

Sheri Giger:

I'm not even sure we covered everything we should have. It's just that [inaudible 00:21:50], right?

Rob Parsons:

Yes. We'll have to see if we have to have a follow-up episode in the months ahead.

Sheri Giger:

We very well may, and just see where we are. It may be a completely different conversation from today. Yeah. It's been great to share, and I'm happy to do a follow-up.

Rob Parsons:

Awesome. Thank you so much for joining the podcast today.

Sheri Giger:

Thank you very much for having us, Rob.

Rob Parsons:

And thank you to our listeners for joining. This certainly is a critical topic for all of us. If you'd like to learn more about vaccination policies, including data on how businesses plan on managing the process, you can download our free research report at paychex.com. Thank you all and a happy and healthy tomorrow for everyone.

Speaker 3:

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